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## Ideology, Race, and the Death Penalty: "Lies, Damn Lies, and Statistics" in Advocacy Research

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We use the literature on race in death penalty to illustrate the hold that ideology has on researchers and journalists alike when a social issue is charged with emotional content. We note particularly how statistical evidence become misinterpreted in ways that support a particular ideology, either because of innumeracy or because—subconsciously or otherwise—one's ideology precludes a critical analysis. We note that because white defendants are now proportionately more likely to receive the death penalty and to be executed than black defendants that the argument has shifted from a defendant-based to a victim-based one. We examine studies based on identical data coming to opposite conclusions, and the most recent studies using advanced techniques such as propensity score matching that fail to find any race-of-victim bias. It is concluded that those of us who oppose the death penalty would better do so by basing arguments on moral, financial, and innocence claims rather than claims of racism because such claims are harmful to race relations.

### **Keywords**

race, ideology, death penalty, African Americans, disproportionality, advocacy, criminology, victim bias

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We use the literature on race in death penalty to illustrate the hold that ideology has on researchers and journalists alike when a social issue is charged with emotional content. We note particularly how statistical evidence become misinterpreted in ways that support a particular ideology, either because of innumeracy or because—subconsciously or otherwise—one’s ideology precludes a critical analysis. We note that because white defendants are now proportionately more likely to receive the death penalty and to be executed than black defendants that the argument has shifted from a defendant-based to a victim-based one. We examine studies based on identical data coming to opposite conclusions, and the most recent studies using advanced techniques such as propensity score matching that fail to find any race-of-victim bias. It is concluded that those of us who oppose the death penalty would better do so by basing arguments on moral, financial, and innocence claims rather than claims of racism because such claims are harmful to race relations.

## Introduction

The conventional wisdom in the United States about the death penalty is that it is unremittingly racist in that African-Americans are disproportionately condemned to death, and that this is particularly true if the victim was white. The death penalty is a moral issue hotly debated by scholars, lawyers, and politicians, especially when paired with issues such as racial bias in sentencing. We address the death penalty only to critique the conventional wisdom as it applies to the role of race in its application, and to illustrate the part that ideology plays in generating and sustaining that wisdom. The conventional wisdom in academia and the media arose in the 1970s – early 1980s when the data unequivocally supported it, but since the late 1980s -early 1990s, many studies have questioned it, and some have demonstrated that the situation has reversed itself. These studies threatening the conventional wisdom comprise a body of research that Thomas Kuhn (1970) characterized as anomalies that threaten the dominant paradigm. Over time, these anomalies may crystallize into a new paradigm, but they are stoutly resisted by the defenders of the conventional wisdom embedded in the old, and are "often not seen at all" (Kuhn, 1970, p. 24).

*Ideology* is a loaded word that requires care in its usage. Ever since Karl Marx's "false consciousness" it has been used pejoratively to denote emotional rather than considered reasoning (Murray & Kujundzic, 2005). We conceive of ideology here not as false consciousness in the Marxian sense (i.e., the blind acceptance by the misled proletariat of the dominant capitalist ideology as opposed to the "correct understanding" of their oppression and exploitation posited by Marx and Engels)., Rather, we view it as something embedded in the everyday habits of thought that shape each person's taken-for-granted "common sense" that may or may not distort reality. We also view it as mostly something that lies just beneath the conscious level much of the time in the Mannheimian sense (Mannheim, 1936). The deeply emotional issue of the death penalty as it

applies to race engages opposing ideologies in academic discourse like few others. The arguments among death penalty scholars are more like a lawyer's than a scientist's—designed to support a predetermined end (winning the case)—rather than trying to resolve differences and ambiguities and uncovering a mutually agreed upon “truth.”

Most people in the United States view ideology in terms of a bipolar distinction between the ideologies of "left" and "right"; liberal and conservative (Jost, 2006). Few people anchor their attitudes toward various issues in terms of an abstract ideology, but we can place almost all of them somewhere on a left-right ideological continuum. That is, each person tends to adopt consistent positions toward a variety of issues that results in the crystallization of their opinions, attitudes, and values into an ideology. Ideology helps us to evaluate the multitude of issues we encounter through a kind of subconscious "factor analysis," that reduces them to broad manageable value choices (Federico & Schneider, 2007). Such "clustering" allows for a large degree of attitude consistency and reduces cognitive dissonance. Attitudes thus tend to crystallize and become relatively unresponsive to contrary opinions.

We are aware that pigeon-holing all individuals into broad liberal and conservative boxes edits out all qualifiers and ignores all nuances. Nevertheless, we treat these systems as Weberian ideal types for heuristic purposes. These contrasting systems aspire not only to explain how the world works, but also (1) what to do to preserve it as it is, or (2) how to change it to what it “should be.” Although this may be overly simplistic, we cannot deny that we see the same people consistently assemble on opposite sides of the barricade on a host of different “preserve-or-change” issues such as abortion, illegal immigration, gay marriage, school prayer, school vouchers, the free market, and so on. We see people of different dispositions being attracted to the values of grassroots movements such as the Tea Party and Occupy Wall Street with polar ideological

agendas; the first wanting to limit government influence on the economy and the other wanting to expand it. Contrasting positions on these and many other issues define the liberal-conservative divide in the modern United States.

The morality of the death penalty separates liberals and conservatives, but not as tightly as one might think among the general public. Support for the death penalty is found across the conservative-liberal continuum, with the latest Gallup Poll showing that 63% of the American public supported it and 33% opposed it in early 2015. Support is much stronger among conservatives, however, with 75% of self-identified conservatives supporting it (18% opposed) versus 60% of moderates (34% opposed) and 47% of liberals (50% opposed) (Gallup Poll, 2015). However, there is an ideological gap between the public at-large and academics, who are typically thought to be overwhelmingly liberal (Cushman, 2012). Gross and Simmons (2007) show that liberal dominance in academia is not as overwhelming as many suppose, but liberalism is particularly dominant in the social sciences. Fifty-eight percent of social scientists identified themselves as liberal (24% as "radicals"), 36.9% as moderate, and only 4.9% as conservative. Professors in the "harder" (engineering) and "practical" (business; health sciences) disciplines are much less likely to identify as liberal (Gross and Simmons, 2007).

It is in the social sciences, however, that ideology is most likely to animate a scholar's research agenda, including death penalty research. Among social scientists, criminologists and criminal justices are most likely to carry out death penalty research, and one study of 770 criminologists/criminal justices found that 68.4% identified themselves as liberal or radical, 26.1% as moderate, and only 5.4% as conservative (Cooper, Walsh & Ellis, 2010). Moreover, Radelet & Laycock (2008) surveyed 77 eminent fellows of the American Society of Criminology and found that 88.2% did not believe that the death penalty is a deterrent. Radlett and Laycock did

not directly ask if they support the death penalty; only about its deterrent effect. One can support it for retributive reasons while still believing it does not deter, but it is reasonable to conclude that this is a rough approximation of non-support since retributive justice is something that most criminologists do not support (Stohr & Walsh, 2016). It is reasonable to suppose, then, that death penalty discourse is largely dominated by a liberal strong slant that may lead death penalty researchers, consciously or subconsciously, to slide into advocacy. The media pick up on the results of such research and trust it, and quote it.

### **Race, Disproportionality, and Advocacy Research**

Charles Manski (2011) writes that reluctance to consider views contrary to our own often results in claims of "incredible certitude" for scholarly work congenial to our own views (p. 261). He further asserts that almost all arguments about social policies with moral content such as the death penalty involve "dueling certitudes" that conflate "science and advocacy," engage "wishful extrapolation," and results in "media overreach" (interpreting scholarly research as definitive). The American Society of Criminology was guilty of "incredible certitude" when it called for the abolition of capital punishment in 1989 based on a "consensus" that it provides no deterrent effect and is racist in its application. But as Manski (2011) points out: "Consensus does not imply truth..." (p. 262). Eminent death penalty researcher Daniel Nagin (2012) adds that "Certitude is easy to express. Expressing ambiguity but still maintaining clarity is very hard to do..." (p. 4). Nevertheless, a number of statements expressed with "incredible certitude" about race and the disproportionate application of the death penalty and illustrating "media overreach" are shown below from various organizations and authors:



“African Americans are disproportionately represented among people condemned to death in the USA. While they make up 12 percent of the national population, they account for more than 40 percent of the country’s current death row inmates, and one in three of those executed since 1977” (Amnesty International, 2003).

“Approximately 35% of those executed since 1976 have been black, even though blacks constitute only 12% of the population. The odds of receiving a death sentence are nearly four times higher if the defendant is black than if he or she is white” (American Civil Liberties Union, nd).

“The national death-row population is roughly 42 percent black, while the U.S. population overall is only 13.6 percent black, according to the latest census. We’ve long known that the death penalty disproportionately kills people of color” (Matt Ford in *The Atlantic*, June, 23<sup>rd</sup>, 2014).

“Last week was the 35th anniversary of the return of the American death penalty. It remains as racist and as random as ever” (David Dow in *The New York Times*, July 8<sup>th</sup>, 2011).

“[E]ven if it were clear that blacks and non-black defendants were treated fairly and consistently in America’s death-sentencing system, there are also concerns about the substantial over-representation of blacks on death row in America (13 percent of the nation’s civilian population versus 42 percent of the death row population)” (Acker, Bohm & Lanier, 2014:531).

These claims are true on their face; the statistics are accurate, but the interpretation is bogus, and constitute examples of what Joel Best (2001, p. 62) call "mutant statistics." Neil Gilbert

(1998, p. 102) calls such statements examples of "advocacy research" that purposely paints the grimmest of pictures to force fence-sitters to take notice. According to the latest information for the Death Penalty Information Center (DPIC) (2015), African-Americans have been between 11% and 13% of the U. S. population between 1976 and 2015, and have constituted 35% of the executions. Likewise, blacks comprise 42% of current U.S. death row inmates. Thus, since the resumption of executions in 1976, blacks have been overrepresented relative to their proportion of the general population by roughly 3 to 1 in terms of executions and as death row residents.

As we have seen from the statements above, this is almost always taken by the media (as well as some academics) as clear evidence that the death penalty is still biased against African-Americans. The disproportionality argument is repeated mantra-like without giving any serious thought to the logic behind it because it produces a comfortable fit with the ideological views of death penalty opponents, including those of the present authors. We rarely seek to question something that slots comfortably into our ideology because to do so may lead us to question other positions located under the same umbrella and produce cognitive dissonance. Indeed, we unthinkingly accepted this view ourselves until we spent more than two years researching the death penalty for our book and received abundant feedback from at least 16 reviewers (Hatch & Walsh, 2016).

Of course, as we know from our first exposure to statistics but sometimes forget, claims of disproportionality cannot be evaluated by comparing different things. The percentages of each race executed or on death row must be compared with the percentage of each race *eligible* to be included in those sub-populations, and not with their proportion of the general population. To assess this claim logically we have to compare each race's proportion of *murderers* with its proportion executed or on death row. Social scientists (and the DPIC) are well aware of this, but rarely make

this awareness explicit, and perhaps cannot even acknowledge it to themselves in the Kuhnian (1970) sense of not “seeing at all.” If we assess racial differences among the people on death row with the correct target population in mind, a very different picture emerges.

In 2013, 52.2% of individuals arrested for murder in the United States were African-Americans and 47.8% were white (FBI, 2014). The FBI places Hispanics and non-Hispanic whites into a single “White” category (93% of Hispanics-Latinos are defined as white) in its Uniform Crime Reports (UCR), so we cannot make direct black/white comparisons between UCR and DPIC statistics. The inclusion of Hispanics in the white category inflates white crime figures because Hispanics have a higher crime rate than non-Hispanic whites (Steffensmeier et al., 2010). Steffensmeier and his colleagues (2010) calculated that when Hispanics are taken out of the white category, the black homicide rate averages 12.7 times higher than the white rate. Fox and Levin (2001) find that African-Americans are overrepresented in every homicide category, ranging from 66.7% of drug-related homicides to 27.2% of workplace homicides, and the Radford University’s Serial Killer Information Center (Aamodt, 2015) finds that African-Americans have been 57.9% of serial killers in the U.S. from 2000 to 2014; whites 34%, Hispanics 7.9%, and Asian Americans 0.06%.

With these data in mind, we should formulate a much different perspective on the disproportionality statements that we see in both the popular media and in scholarly works. A comparison of homicide and execution/death row data led Matt Robinson (2008) to the conclusion in his work on the death penalty that: “Although they are overrepresented among death row populations and executions relative to their share of the U.S. population, blacks are underrepresented based on their arrests and convictions for murder” (p. 191). This raises the question of why the perception is the opposite of the reality.

## The Origins of the Conventional Wisdom

The history of race relations in the United States is painfully disturbing. African-Americans have been treated badly from the time that the first African slaves landed in America in 1619 until relatively recently. In terms of the death penalty, in Virginia, slaves could be convicted of 66 crimes carrying the death penalty at one point, and free blacks could be executed for rape into the 20<sup>th</sup> century; only murder carried the death penalty for whites (Bohm, 2012). Blacks were subjected to such laws under slavery for over 200 years, and after emancipation they were subjected to the Black Codes, Jim Crow laws, disenfranchisement, “separate but equal” statutes, literacy tests, vicious stereotypes, and lynch mobs (Walsh & Hemmens, 2014).

Those who are aware of this history have a tendency to examine modern racial issues in its context, and find it difficult to imagine that the death penalty can be administered in a racially neutral way and to take racial bias in capital cases for granted. For others, history is just that—history, and that in this modern age things have changed dramatically in the United States. Some scholars maintain that death penalty opponents raise the racial issue not out of any special concern for African-Americans or for racial bias issues, but because they abhor the penalty itself for moral reasons and use race to center their arguments (McAdams, 1998).

Indeed, members of the U.S. Supreme Court have been guilty of allowing their personal beliefs about the death penalty to guide their rulings in capital cases. The primary role of the U.S. Supreme Court is to ensure that laws are constitutional, yet some justices are blinded by their ideology and thus let it dictate their rulings, rather than the law. Consider the opinions of Justices William Brennan and Thurgood Marshall, both liberal judges, who served on the Court during the *Furman* era and remained until the early 1990s. Justice Brennan, in writing a dissent for *McCleskey*

*v. Kemp* (1987) (death penalty case discussed at length shortly) was adamant that we should not forget our country's long history of racial discrimination when trying to move forward:

In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that, in three decades, we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

But it is this very stubbornness, or holding on to the past, that imprisons us from moving on and blinds us to accepting any other reality or progress in moving past discriminatory practices. These two justices were relentless in their quest to vote against just about every single capital case before them, regardless of the specific issues or merits of a case; this amounted to more than 2,000 capital cases during their Court tenure. Brennan and Marshall typically joined in their opinions, issuing standard boiler plate language along these lines: "Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments... we would grant certiorari and vacate the death sentences in these cases" (*Gregg v. Georgia*, 1976, ).

Justice Marshall became the first African-American justice to serve on the U.S. Supreme Court. He grew up in segregation and was the grandson of a slave. Prior to serving on the Court, he worked tirelessly for the rights of Blacks and argued before the Court in the historic *Brown v. Board of Education* (1954) case. As a member of the Court, he focused his efforts on fighting racial discrimination and social injustice. He once explained his legal philosophy: “You do what you think is right and let the law catch up” (Savage, 2010, p. 1). Though this sentiment might be appealing to many, it is the role of our Nation’s highest Court to interpret the law in the context of the constitution, even if they do not agree with the morality of some laws. Marshall’s former clerk (and now U.S. Supreme Court Justice herself), Elena Kagan, admits that she struggled to write opinions for Marshall because she could often find no legal basis for the decisions that he asked her to write. Kagen explained that Marshall “allowed his personal experiences and the knowledge of suffering and deprivation gained from those experiences, to guide him” (Savage, 2010, p. 1). Making no secret of his intent to wage a war against the death penalty (as well as his other causes), Marshall admitted that he only hired law clerks who liked working on dissents (Mello, 1995). Although she agrees with Brennan and Marshall’s moral stance on the death penalty, current Supreme Court Justice Ruth Bader Ginsburg recognizes that she must separate her personal feelings about the death penalty from her role as a judge (and this would also be excellent advice for researchers):

If I had my way there would be no death penalty. But the death penalty for now is the law, and I could say ‘Well, I won’t participate in those cases,’ but then I can’t be an influence. Every time I have to participate in a case where someone has been sentenced to death, I feel that same conflict. ...But when you’re with a group of

nine people, the highest court in the land, you can't pretend to be king or queen  
(cited in Tabak, 2014).

There is plentiful evidence of anti-black bias in the administration of the death penalty way into the 20<sup>th</sup> Century. Elliot Cramer's (2009) testimony before the House Select Committee of North Carolina on the death penalty indicated that from 1910 to 1961, 133 blacks and 36 whites were executed in North Carolina. However, he also indicated that since 1984 the situation changed dramatically with 13 blacks and 28 whites being executed in the state. The evidence now points to black underrepresentation on almost all death rows in the United States.

Blume, Eisenberg and Wells (2004) looked at this disproportionality issue with data from the 31 states that sentenced 10 or more individuals to death from 1977 through 1999 (5,953 death sentences). They compared the proportion of convicted black murder offenders in each state with the proportion of black inmates on death row. They found that in California, Nevada, and Utah, blacks were overrepresented on death row relative to their proportion of murders in those states, but that in all other 28 states they were underrepresented. In Nevada the percentage of black murder offenders during that 22-year period was 30.2%, and the percentage of blacks on death row was 33.1%. In Utah the respective percentages were 8.6% and 10.5, and in California they were 33.8% and 35.3%. African-Americans are thus overrepresented in proportion to the proportion of murders they commit in these three states. These differences are miniscule compared to the remaining 28 states, where they were underrepresented to a large degree. In Tennessee, African-Americans committed 60.4% of murders in the state, but their percentage on death row was 33.3%. In Mississippi the respective percentages were 77.9% and 59.0%, and in Missouri they were 62.6% and 41.1%. However, only a tiny fraction of homicides are death eligible, and an even smaller

proportion (about 2% to 6%, depending on jurisdiction) actually receive a death sentence (Berk, Li & Hickman, 2005; Streib, 2003).

It seems from these data that white murderers are proportionately more likely to both receive a death sentence and to be executed for death-eligible homicide. For instance, an early post-*Furman* (referring to *Furman v. Georgia* that led to a de facto moratorium on capital punishment throughout the United States from 1972 to 1976) study found from 1930 onwards in the Northern states that whites were more likely to receive the death penalty, and that the discrimination evidenced against blacks in death penalty cases in earlier years in the South disappeared in later years (Kleck, 1981). Greenfeld and Hinnens (1984) looked at 1,405 prisoners under sentence of death and found that 15.8 per thousand white murderers were sentenced to death versus 11.6 per 1,000 black murders. A large study by Gross and Mauro (1989) looked at death sentences in over 14,000 cases and found that whites received a death sentence in 26.5% of the cases involving felony circumstances and in 1.4% of the cases with non-felony circumstances. On the other hand, 17.2% of blacks convicted in felony circumstances and 0.4% in non-felony circumstances received a death sentence (calculated by McAdams [1998] from Gross and Mauro's data). A 2001 U.S. Justice Department (2001) study of federal death-eligible cases reached a similar conclusion in federal murder cases:

United States Attorneys recommended the death penalty in smaller proportions of cases involving Black or Hispanic defendants than in those involving White defendants; the Attorney General's capital case review committee likewise recommended the death penalty in smaller proportions of involving Black or Hispanic defendants.... In the cases considered by the Attorney General, the Attorney General decided to seek the death penalty for 38% of the White defendants,



25% of the Black defendants, and 20% of the Hispanic defendants.

Why we should see a disproportional number of white murderers receiving the death penalty relative to blacks is a question yet to be addressed in any systematic fashion. When African-Americans were disproportionately charged, convicted, and executed for capital crimes it was relatively easy to explain in terms of racism. Yet the Southern states—long considered the bastions of racism—are the states in which blacks are most underrepresented on death row relative to the number of murder they commit. One explanation is that the Southern states have large African-American populations, and African-Americans have been shown to be less likely to favor the death penalty than whites (Blume, Eisenberg & Wells, 2004). With a fair proportion of blacks on a jury, prosecutors may decide not to seek the death penalty, or black jurors may refuse to convict if the death penalty is on the table, especially if the defendant is black. Another view is that perhaps prosecutors, judges, and juries are more careful in handling minority cases in an attempt to convince themselves they are being impartial in their treatment of minorities and are keen to avoid the dreaded “racist” label.

### **The Issue of Victim’s Race**

With all the evidence now showing that black murder defendants are less likely to be sentenced to death than white murder defendants, the race issue has become victim-centered rather than defendant-centered. However, it is still very much a race issue divided along ideological lines. The literature consistently shows that killers of whites (regardless of the killer's race) are more likely to receive the death penalty than killers of other racial groups. Because homicide is overwhelmingly intraracial, this is the primary reason that whites are more likely to receive the death penalty. Prosecutorial reluctance to seek the death penalty for blacks might be revealing a

devaluation of black victims vis-à-vis their white counterparts, and a perception that black-on-black crime is not a threat to the white power structure. Thus the race issue in death penalty discourse is thus still alive and well, but it has done something of a U-turn. McAdams (1998) contends that now a greater proportion of condemned whites are executed than condemned blacks, capital punishment opponents who:

first adopted an offender-centered concept of justice. . . . turned on a dime and adopted a victim-centered concept of justice (when the data in fact showed that too many whites are being executed). Had they maintained a philosophical consistency, the opponents might have lauded the current situation on the ground that a sort of affirmative action was being employed. That is, against a historic background of harsh treatment of black people in most aspects of public policy, black offenders are getting favorable treatment from the criminal justice system (p. 160).

The focus has now moved from bias against black *defendants* to bias against black *victims* or, conversely, bias in favor of white victims, particularly white female victims. Thus, when we see fewer blacks receiving a death sentence and being executed than whites, it is not because of any bias in favor of black defendants or against white defendants, but rather bias in favor of white victims. Moreover, the charge made today is that the death penalty is most often sought when the victim is white and the perpetrator is black.

This victim-centered argument regarding racial prejudice and the death penalty centers on the work of Baldus, Pulaski, and Woodworth (1983), and has become known as “the Baldus study.” This study was widely cited in *McCleskey v. Kemp* (1987) before the United States Supreme Court. McCleskey was a black man convicted of murdering a police officer in Georgia and sentenced to death who claimed that the death penalty was racially biased in favor of white

victims. The Baldus study examined over 2,000 murder cases that occurred in Georgia during the 1970s in support of McCleskey. The raw numbers in Baldus' study indicated reverse racial disparity according to the race of the defendant, with 4% of the black defendants receiving the death penalty and 7% of the white defendants. But the real issue in the case was the race of the victim. In denying McCleskey's claim and writing the majority opinion, Justice Lewis Powell wrote that: "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks" (cited in Weatherspoon, 1998, p. 193-194). Powell's statement may be the most quoted line in death penalty discourse and, as shown with a few samples below, sparked numerous "copycat" citations.

"Professor David Baldus examined sentencing patterns in Georgia in the 1970's. After reviewing over 2500 homicide cases in that state, controlling for 230 non-racial factors, he concluded that a person accused of killing a white was 4.3 times more likely to be sentenced to death than a person accused of killing a black." (American Civil Liberties Union, nd).

"[D]efendants charged with killing white victims are 4.3 times as likely to receive a death sentence as defendants charged with killing blacks" (Bedau, 1997, p. 254).

"They [the Baldus study] found that those accused of killing white victims were four times as likely to be sentenced to death than those of killing black victims" (Baumgartner, Grigg and Masto, 2015, p. 2).

The "Baldus study demonstrated that a defendant charged with killing a white victim was 4.3 times more likely to receive a death sentence than a defendant charged with killing a black victim" (Smith & Cohen, 2012, p. 229).

Baldus' "4.3" is misinterpreted by many people on many occasions as a 4.3 times *greater likelihood*, when it is actually an odds *ratio*. Arnold Barnett (1994), a math professor at MIT, used the McCleskey quote (among others unrelated to the death penalty) to illustrate the misuse of statistics and "to discourage fellow citizens from taking a strong position or course of action based solely on a press report" (p. 38). The problem is one of confusing probabilities with odds, particularly the ratio between the respective odds represented by their probabilities. We present Barnett's hypothetical example below in simplified bivariate form to show how Baldus, through no fault of his own, continues to be misinterpreted, either out of an unfortunate innumeracy, which is forgivable, or purposely, which is not.

	<u>Victim's Race</u>	
<u>Death Sentence</u>	<u>White</u>	<u>Black</u>
Yes	99	96
no	<u>1</u>	<u>4</u>
	100	100

Note first that a death sentence was received by 99 defendants (regardless of race) who murdered whites in extremely aggravated circumstances and by 96 (again, regardless of race) who murdered blacks under similar circumstances. Translating this into an odds ratio, things get confusing for people lacking statistical training. The odds of some outcome is calculated by the ratio of the probability of the outcome occurring ( $p$ ) and the probability of it not occurring ( $q$ ), or  $\text{odds} = p/q$ . A death sentence for a defendant given a white victim is thus obtained by the probability of a death sentence ( $99/100 = .99$ ) divided by the probability of not getting a death sentence ( $1/100 = .01$ ). The odds of a death sentence given a white victim is thus  $.99/.01 = 99$ , or 99:1. The probability of a death sentence given a black victim is ( $96/100 = .96$ ), and the probability of not getting a death sentence is ( $4/100 = .04$ ). The odds of a death sentence given a black victim in this example is thus  $.96/.04 = 24$ . The odd ratio is the ratio of the odds of receiving a death sentence given a white victim (99) and the odds of receiving a death sentence given a black victim (24); therefore the odds ratio =  $99/24 = 4.125$ . The odds ratio should be interpreted as “The odds of a defendant who killed a white victim are 4.125 times greater than the odds of receiving a death for a defendant who killed a black victim.” To interpret it as a “4.125 more likely to get a death sentence” is simply wrong. The real difference is the difference between a considerably less egregious 99% and 96%.

### **Race of Victim Bias: The Data**

All studies do indeed show that killers of whites (regardless of the race of the killer) are more likely to receive the death penalty than killers of blacks. In the Gross and Mauro (1989) data, 28.8% of blacks who killed whites under felony circumstances received a death sentence versus 6% of blacks who killed other blacks under similar circumstances. Whites who killed blacks under

felony circumstances received a death sentence 18.2% of the time. Thus whites who kill blacks are more likely to receive the death penalty than blacks who kill blacks, although this must be viewed in light of the fact that whites only commit about 5% of interracial murders (Robinson, 2008).

Concern about race-of-victim bias motivated the National Institute of Justice (NIJ) to commission three independent teams to examine the role of race in the application of the death penalty in federal cases. These data are summed up in a 209 page NIJ report in which Klein, Berk and Hickman (2006, p. xvii) write:

When we look at the raw data and make no adjustment for case characteristics, we find the large race effects noted previously—namely, a decision to seek the death penalty is more likely to occur when the defendants are White and when the victims are White. However, these disparities disappear when the data coded from the AG’s [Attorney General’s] case files are used to adjust for the heinousness of the crime. For instance, [one of the studies] concluded, “On balance, there seems to be no evidence in these data of systematic racial effects that apply on the average to the full set of cases we studied.” The other two teams reached the same conclusion. [One team] found that, with their models, after controlling for the tally of aggravating and mitigating factors, and district, there was no evidence of a race effect. This was true whether we examined race of victim alone . . . or race of defendant and the interaction between victim and defendant race.” [the third study’s author] reported that his “analysis found no evidence of racial bias in either USAO [U.S. Attorney’s Office] recommendations or the AG decisions to seek the death penalty.

A recent study by Hermant Sharma and his colleagues (2013) looked at all first-degree murder convictions in Tennessee from 1976 to 2007. They noted that prosecutors sought the death penalty for 76% of white defendants and 62.6% of black defendants, and that 37.3% of white defendants for whom the death penalty was sought received it versus 23.6% of black defendants. Prosecutors sought the death penalty in 64% of the cases where the victim was white, and in 33% of the cases where the victim was black. When controlling for a variety of aggravating and mitigating factors, as well as demographic, and evidentiary variables, they found that the killing of a law enforcement officer or child, a history of prior violent offenses, and all evidentiary (scientific, co-perpetrator testimony, confession, and strong eye witness testimony) variables were by far the strongest predictors of receiving a death sentence for defendants of any race. Their most important finding was that victim's race did not play any significant independent part, but victim's sex (female) did. The racial make-up of the crime (black offender/white victim; white offender/white victim, etc.) had no significant independent effect, but race of the defendant did, with whites being significantly more likely to receive the death penalty than blacks over the 30-year period.

### **Dueling Statisticians**

An interesting saying attributed to numerous authors from Mark Twain to Benjamin Disraeli is that there are three kinds of lies: "lies, damn lies, and statistics." Some folks quote this to justify ignorance, but others may quote it as a warning about accepting tortuous mathematical arguments having to do with the social realm as gospel. Darrell Huff's book *How to Lie with Statistics* (1954) has been a classic for over one-half century. Of course, statistics don't lie, but people lie with statistics, either out of ignorance about what the statistics mean or to consciously

or subconsciously support an agenda. For instance, two statisticians used data from 102 U.S. death penalty deterrence studies from 1975 through 2011 to demonstrate how opposite findings can be derived from the same data set with only slight changes in assumptions (Gerritzen & Kirchgässner, 2013). They further concluded that ideology (pro- or anti-death penalty bias) may account for most contradictory findings: “Our results also reinforce the considerations...that selective perceptions might be the cause for divergent findings. If rather different results can be obtained under reasonable assumptions, researchers will consider those outcomes as being reliable which correspond to their pre-conceptions” (p, 24). Opposite findings from the same data sets from Georgia and Maryland are presented below.

Baldus and his colleagues (1983) looked at a number of aggravating and mitigating circumstances and basically argued that with zero or one aggravating factor in a murder case there was no racial discrimination regardless of the racial makeup of the victim/offender dyad. Similarly, with multiple aggravating factors (such as multiple victims, a prior homicide conviction, child victims, torture, and so forth), there was no discrimination and the risk of a death sentence was high regardless of the racial makeup of the victim/offender dyad. However, it was at the middle range of aggravating circumstances where the “correct” sentence was less clear that racial disparities appear, and here is where the notorious “4.3” odds ratio came from.

In an analysis of the same Georgia data that Baldus relied on, Joseph Katz (2005) examined all aggravating and mitigating circumstances. In the 1,082 homicide defendant sample, 141 cases involved a white victim and a black perpetrator. In 67.1% of white victim-black perpetrator (W/B) cases the victim was killed in the course of a robbery compared to 7.4% in black victim cases, and in 70.6% of the W/B cases the victim was a stranger compared with 9.6% of black victim cases. Katz (2005) also indicated that “White victim homicides show a greater percentage of mutilations,



execution style murders, tortures, and beaten victims, features which generally aggravate homicide and increase the likelihood of a death sentence” (p. 405). Katz (2005) cites a number of other studies finding similar results in 10 different states; that is, once the full array of aggravating and mitigating factors are considered there is little or no discrimination evident in white victim-black perpetrator cases that is not accounted for by aggravating circumstances and other legally relevant variables. Unlike the Baldus study, the Katz (2005) study is hard to find cited anywhere. As Cassell (2008) explains the nature of the victim-offender relationship: "Black-defendant-kills-white-victim cases more often involve the murder of a law enforcement officer, kidnapping and rape, mutilation, execution-style killing, and torture—all quintessential aggravating factors—than do other combinations" (p. 23-24).

A study by criminologists Paternoster and Brame (2003) that looked at 1,130 death-eligible homicide cases in Maryland and found no race-of-defendant bias but significant race-of-victim effects. That is, cases in which the offender was black and the victim was white were about 3.5 times more likely than any other offender/victim dyad to receive a death sentence. On the other hand, statisticians Berk, Li, and Hickman (2005) looked at the same data and arrived at the opposite conclusion: “When race surfaces, cases with a Black defendant and White victim or ‘other’ racial combinations are *less* likely to have death sentences imposed” (p. 381). Berk, Li and Hickman (2005) conclude that: “For both capital charges and death sentences, race either played no role or a small one that is difficult to specify” (p. 386).

More recent studies of the "white victim effect" tend to support the “no effect” side of the debate. Jennings and his colleagues (2014) looked at every death-eligible case (N = 1,356) prosecuted in North Carolina from 1977 to 2009. After surveying a number of other studies with contradictory findings (but mostly supporting the white victim effect), they used propensity score

matching (PSM), which is a technique that attempts to overcome a demonstrated effect determined by simply comparing a particular "treatment"—race of the offender/victim dyads in this case—between those who received a death sentence and those who received a life-without-the-possibility-of-parole (LWOP) sentence. They do this by matching cases, which is a step beyond introducing statistical controls as in ordinary least squares regression models. In other words, PSM allows for a statistical approximation of a quasi-experimental design by removing systematic differences between cases prior to comparing the outcome of interest—death versus LWOP.

Jennings and his colleagues (2014) first estimated the white victim effect using traditional statistical (logit regression) models controlling for 50 legal and non-legal factors and found, regardless of offender's race, there was a significant race of victim effect with an odds ratio of 1.393. In effect, this means that the odds of receiving a death sentence if the victim was white is 1.393 times greater than the odds of a death sentence if the victim was of any other race. When they looked at black offender/white victim dyads, the odds ratio was 2.834. After applying PSM to the data, however, both effects were close to zero; that is, neither race of victim nor the racial makeup of offender/victim dyads had any independent effect on whether or not a defendant received the death penalty. The authors conclude that: The "'White victim effect' on capital punishment decision-making is better considered a 'case effect' rather than a 'race effect'" (Jennings et al., 2014, p. 384). In other words, each case is unique in that it contains a multitude of case characteristics (aggravators and mitigators) and evidentiary qualities that have to be considered. Given the ability to case-match (albeit, imperfectly), this quasi-experimental approach is currently the best that we have to tease out any discriminatory effects that may be present in sentencing.

Another study of 1,163 capital cases in North Carolina found an additional complication (Bjerregaard et al., 2015). This study found that blacks who killed whites in "high severity"

circumstances (multiple aggravating “heinous, atrocious, and cruel” factors) had an increased probability of a death sentence, but blacks who killed whites at lower levels of severity (a shooting death in the process of a botched robbery, for example) had decreased probabilities of receiving the death penalty. Under low severity circumstances, a black defendant who kills a white victim had almost half the odds of receiving a death sentence than a black defendant who kills a black victim or a white defendant who kills either a white or black victim. This is an extremely odd finding that is difficult to explain, and the authors did not try to. What is revealing is that the average number of aggravating factors in black defendant/white victim cases (23.4% of the cases) was 2.20 while the average in white defendant/black victim cases (3.6% of the cases) was 1.47 factors ( $p < .01$ ). The average number of aggravating factors in black/black cases (30.9% of cases) was 1.96, and for white/white (42.1% of cases) it was 1.84. This supports the earlier Katz (2005) study that black defendant/white victim cases are more likely to have multiple aggravating factors.

Despite the growing sophistication of our methodological and statistical tools, we still have studies making conflicting claims with “incredible certitude.” Of course, something may be true in one jurisdiction but not in another, or true in the same jurisdiction at one time one but not at another time. But the Georgia and Maryland analyses discussed above were made by separate teams examining the *exact same data* and arriving at different conclusions. In death penalty studies involving race we are often confronted with dueling statisticians just as we see psychiatrists for the state and for the defense making contrary claims about the same defendant. But that’s the “soft” science of psychiatry; mathematics is supposed to be the ultimate of dependable objectivity and “truth”? It is, but we have seen that people purposely or inadvertently mangle statistical output. Scheidegger (2012) writes: “...many academics who do research on the death penalty reliably

produce results that favor one side, raising a suspicion of partisan bias” (p. 161). This is similar to Gerritzen and Kirchgässner’s (2013) contention that ideology, thinly disguised within various statistical assumptions, plays a huge role in capital punishment discourse.

## **Conclusion**

We have used the death penalty literature to examine the role of ideology in researching the issue as it pertains to race, and in the popular media's interpretation of it. As a deeply emotional issue, we should expect ideology to play a larger role than it does in more dispassionate topics. We have noted Kuhn's (1970) statement that research that does not fit into the current paradigm—the conventional wisdom—is "often not seen at all" and provided examples (p. 24). The first example was the argument of disproportionality in which comparisons are made between the proportions of people of each race on death row and who have been executed and their proportions of the general population. Many commentators have been guilty of "often not seeing at all" that this is an invalid comparison, and that the correct comparison should be made between the respective racial proportions of the sub-populations of murderers who are eligible for the death penalty.

It is understandable why journalist may fail to grasp the distinction. Gilbert (1997, p. 124) asserts that because "the majority of journalists hold distinctly liberal positions on political and social issues" the media rushes to embrace sensationalized "advocacy research" and are ever looking for stories that cast journalists "in the role of moral guardians." Advocacy research has a noble history in bringing problems to public attention and raising consciousness, but advocacy is not science. The role of social scientists qua scientists is to engage problems as objectively and

dispassionately as possible, not to inflate them and redefine them in ways that fit a particular ideological preference.

Unlike journalists, many death penalty researchers recognized the fallacy and shifted the focus from defendant-centered to victim-centered research with the realization that the situation has reversed itself, with white defendants being proportionately more likely than black defendants to receive a death sentence. Much of this discourse has centered on the famous 1983 study of David Baldus and his colleagues which was quoted at length in the United States Supreme Court case of *McClesky v. Kemp* (1987). We saw that the Court's error in this case was to misinterpret an odds ratio as a "greater likelihood" or as "more times likely." Nevertheless, it is demonstrably true that white victim cases are more likely to draw the death penalty for black and white defendants alike, but there are valid legal reasons why this is so. The latest studies using more sophisticated quasi-experimental methods (propensity score matching) find that white victim cases tend to have many more aggravating and fewer mitigating circumstances involved regardless of the race of the defendant. It is these "case characteristics" rather than "race characteristics" that account for the white victim effect.

Those of us who oppose capital punishment can oppose it on moral, financial, or innocence claims where the arguments stand on stronger philosophical and empirical ground than race-based claims. False claims of anti-black bias in death penalty cases can do great harm to the already tenuous nation of race relations in this country. A recent Gallup Poll (Saad, 2015) showed that only 30% of Americans are satisfied or somewhat satisfied with race relations in this country, and telling African-Americans that "Black lives don't matter" in death penalty discourse does not help the situation. Walsh and Ellis (2004) have called ideology criminology's "Achilles' heel" retarding the development of its full potential. Ideology forms, shapes, and colors our concepts of crime, its

causes, and what to do about it, as it does with so many other things. Ideology is a deeply-rooted thing and difficult to confront, but as professionals claiming scientific status it behooves us to do exactly that.

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